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No. 89-8

In the Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE J. ARNOLD, JR., ET AL., PETITIONERS

v.

POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Postal Inspection Service discriminated against older employees in violation of the Age Discrimination in Employment Act of 1967 because, as part of a plan to correct a shortage of experienced postal inspectors in major metropolitan areas, it filled vacancies in those areas that no inspector volunteered to fill by selecting the most senior eligible employee who had not previously fulfilled his commitment to serve in a major metropolitan area.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 863 F.2d 994. The opinion of the district court (Pet. App. 39a-87a) is reported at 667 F. Supp. 6.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1988. A petition for rehearing was denied on March 2, 1989 (Pet. App. 88a-89a). The petition for a writ of certiorari was filed on June 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Postal Inspection Service, the law enforcement branch of the Postal Service, is responsible for "investi-

gat[ing] postal offenses and civil matters relating to the Postal Service." 39 U.S.C. 404(a)(7). There are more than 1,900 postal inspectors, who range in grade from levels 17 through 24. Postal inspectors ordinarily spend one year as a level 17 inspector, one year at level 19, and two years at level 21 before being promoted to level 23. Level 24 inspectors are team leaders who supervise groups of inspectors from the other levels. In order to ensure the mobility of these employees, the Inspection Service is authorized by statute (39 U.S.C. 1001(e)(2)) to transfer any postal inspector, from any level, at any time. Pet. App. 4a-5a. In addition, all inspectors sign consent statements indicating that they are willing to relocate. *Id.* at 47a.

In response to a shortage of experienced postal inspectors in 14 major metropolitan areas (MMAs), particularly New York City, the Service instituted the Career Path Policy (CPP) in December 1980. The CPP provides that all level 23 inspectors should spend five years in an MMA during the course of their service. Under the CPP, level 23 postal inspectors are encouraged to apply for lateral reassignments to vacancies in MMAs of their choice at times they find convenient; if more than one level 23 postal inspector bids for such a vacancy, the first to bid receives the assignment. If no level 23 inspector applies for a vacancy, level 21 inspectors are given the opportunity to accept the post with a promotion to level 23. If a vacancy is not filled by either voluntary means, the Service chooses the level 23 inspector who is most senior, in term of service, for mandatory reassignment. Certain postal inspectors are exempt from mandatory reassignment, including those

who are eligible to retire within five years,[1] those who have relocated within the past two years, and those who have already fulfilled the requirement that they serve in an MMA. Pet. App. 5a.

Petitioners are postal inspectors who contend that the Postal Service discriminated against postal inspectors age 40 and over in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The district court ruled in their favor under both disparate treatment and disparate impact theories. It focused on that aspect of the CPP providing that, if an opening is not filled voluntarily, the most senior eligible postal inspector is assigned to the position, which it termed the "senior-first rule." In the district court's view, the Postal Service should involuntarily "transfer[] postal inspectors on a random basis" rather than select the most senior postal inspector for transfer. Pet. App. 63a.

The court of appeals reversed. Pet. App. 1a-38a. It concluded that the CPP is "a rational and orderly system to ensure that all level 23 inspectors serve a tour of duty in an MMA prior to retirement." *Id.* at 11a. "Because the senior-first rule does not stand alone," the court stated, "it is neither fair nor reasonable to judge the motives of the Inspection Service by uncoupling the rule from the other aspects of what was clearly intended to be an integrated program." *Ibid.* It therefore rejected petitioners' disparate treatment claim. When the CPP is viewed as a whole, the court further noted, the evidence showed that "inspectors aged forty and above constituted 34.4 percent of all level 23 inspectors eligible for transfer into an MMA, and constituted 33.8 percent of all inspectors actually transferred,

[1] Pursuant to 5 U.S.C. 8335(b), postal inspectors, like other federal law enforcement officers, must retire by age 55.

either voluntarily or involuntarily." *Id.* at 9a. Accordingly, it held that there was no basis for a disparate impact claim.[2] The district court's conclusion that the Postal Service should randomly select inspectors for mandatory transfer was unfounded, the court of appeals concluded, noting that "[r]eliance on a lottery would have reduced incentives for voluntary transfers by encouraging chance-takers to gamble on the possibility that they could reach retirement without ever having contributed the five years of MMA service expected of all level 23 inspectors." *Id.* at 11a. Judge Garth, sitting by designation from the Third Circuit, dissented. *Id.* at 13a-38a.

ARGUMENT

1. With respect to the holding on petitioners' disparate impact theory, petitioners contend (Pet. 11-19) that review is warranted because the decision below conflicts with decisions of this Court, primarily *Connecticut* v. *Teal*, 457 U.S. 440 (1982), and decisions of other courts of appeals. In petitioners' view, the court of appeals erred by analyzing the Career Path Policy as a whole, and, like the district court, should have focused narrowly on the "senior-first rule."

The court of appeals did not err. As it stated, "the impact of the CPP on senior postal inspectors can be fairly measured only by taking into account those who, subject to an identical obligation, elected to fulfill their responsibility by volunteering for transfer." Pet. App. 10a. There is nothing novel about viewing the plan as a whole. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 138 (1976)

[2] The United States had argued that disparate impact analysis does not apply to ADEA claims. The court of appeals acknowledged this argument but concluded it did not need to decide that issue because "the CPP does not have a disparate impact on postal inspectors who are forty years of age or older." Pet. App. 8a.

(employee benefits analyzed as a "package" to determine whethe they were worth more to men than to women); *California Brewers Association* v. *Bryant*, 444 U.S. 598, 605-611 (1980) (rule that employees must work 45 weeks per calendar year to obtain benefits due to "permanent" employees must be analyzed as part of entire seniority system). It is undisputed that the percentage of inspectors age 40 and over who were transferred under the CPP (33.8%) fairly reflects the percentage of level 23 inspectors who were 40 or over (34.4%). Thus, the CPP, viewed as a whole, did not have a disparate impact on older inspectors.

As the court of appeals explained (Pet. App. 9a-10a), *Teal* is not to the contrary. In that case, this Court held that an employer could not use a written test in making promotion decisions that a disproportionate number of blacks failed without showing that the test was job-related, even though, as a result of affirmative action in later steps in the promotion process, the employer promoted a higher percentage of black applicants than white applicants. The Court stressed that the test constituted a "pass-fail barrier to employment opportunity" (457 U.S. at 452), and rejected the employer's "bottom line" rationale because it did not remedy the adverse effect of the test on those individuals who failed it. Nothing comparable is at issue here. Under the CPP, all postal inspectors are expected to work at least five years in an MMA. While *Teal* "focused on employment and promotion requirements that create a discriminatory bar to *opportunities*" (457 U.S. at 450 (emphasis by the Court)), this case merely involves a career responsibility applicable "to each and every level 23 employee" (Pet. App. 10a) that can be fulfilled either early or late in an employee's career. Cf. *Smith* v. *Troyan*, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976). In short, the CPP does not

eliminate any employment opportunities, but ensures that the burdens of employment are distributed fairly while giving postal inspectors as much control as possible over their careers.[3]

Nor, contrary to petitioners (Pet. 15-16), does the decision below conflict with the decisions of other courts of appeals. At issue in *Costa* v. *Markey*, 706 F.2d 1 (1st Cir. 1982) (en banc), cert. denied, 464 U.S. 1017 (1983), was a "pass-fail" barrier to employment opportunity comparable to the barrier in *Teal*—a height requirement that adversely affected women applicants for jobs as police officers. No such barrier is involved in this case. The decision in *Massarsky* v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), cert. denied, 464 U.S. 937 (1983), also relied on by petitioners, is fully consistent with the decision here. In that case, General Motors favored the retention of students of its General Motors Institute (who tended to be young) even though this meant that older employees, with more seniority, were laid off. The Third Circuit explained that the mere fact that "a short-service employee was insulated from layoff because of his status as a GMI stu-

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[3] Contrary to petitioners' contention (Pet. 14-15), this Court's recent decision in *Wards Cove Packing Co.* v. *Antonio*, 109 S. Ct. 2115 (1989), does not support their position. In the portion of the Court's opinion cited by petitioners, the Court held that plaintiffs do not establish disparate impact merely by showing that there is a disparity between the percentage of minority employees holding certain jobs and the percentage of minority persons in the relevant labor market. Rather, plaintiffs must "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking." *Id.* at 2125. Here, petitioners have attacked the CPP, but they have failed to establish that, viewed as a whole, it discriminates against older employees. In *Wards Cove*, the Court did not address what sorts of employment practices should be considered together and what sorts of employment practices should be analyzed separately.

dent" at the expense of an older employee was insufficient to show disparate impact. 706 F.2d at 121. Instead, the court explained that the plaintiffs were required to present statistical proof that layoffs were predominating among older workers as a result of the entire plan. This is the same point the court of appeals made in this case in concluding that, while the effect of the CPP may be to force some older employees to transfer involuntarily to MMAs, the overall effect is age-neutral. Pet. App. 9a.[4]

There is no merit to petitioners' contention that certiorari should be granted because the court of appeals "injected a new concept into Title VII analysis—'freestanding'—but has failed to give it content." Pet. 16. The court's use of that term is simply a short-hand method of distinguishing between what this Court in *Teal* called "a pass-fail barrier to employment opportunity" (457 U.S. at 452)—which *can* form the basis for a finding of disparate impact—and one provision of a "plan" or "package"—on which such a finding cannot be based. See *General Electric Co.* v. *Gilbert*, 429 U.S. at 138. The concept is not novel and the use of the word "freestanding" to describe the concept does not justify issuing a writ of certiorari.

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[4] Nor does the Third Circuit's decision in *EEOC* v. *Westinghouse Electric Corp.*, 869 F.2d 696 (1989), petition for cert. pending, No. 88-1770 (filed May 2, 1989) which the EEOC recently asked the Court to vacate in light of *Public Employees Retirement System* v. *Betts*, 109 S. Ct. 2854 (June 23, 1989), conflict with the decision here. The issue in *EEOC* v. *Westinghouse* was whether the company could deny severance benefits to older workers who were laid off on the ground that they were eligible for pension benefits. The Third Circuit determined that the employer could not, because the severance pay plan and the pension plan were separate and "[a]ny right to severance pay was in addition to, not a part of, the preexisting vested right to retirement benefits." 869 F.2d at 705. In the present case, the CPP is plainly *one plan*.

2. With respect to the dismissal of petitioners' disparate treatment claim, petitioners focus on part of one sentence in the court's opinion – stating that the Inspection Service's refusal to instite a lottery was "devoid of any implication of animus" (Pet. App. 11a) – and contend (Pet. 19-23) that review is warranted because plaintiffs need not show that discriminatory treatment was motivated by animus toward the affected group. However, the court of appeals not only found no animus, it also found that there was no discrimination against older employees: "The CPP established that all eligible level 23 inspectors, young or old, should expect to serve five years in an MMA. Viewed in this context, the purpose of the senior-first rule was not to require that the oldest postal inspectors be transferred, but to establish a rational and orderly system to ensure that all level 23 inspectors serve a tour of duty in an MMA prior to retirement." Pet. App. 11a.[5]

Moreover, the court of appeals correctly concluded that the Postal Service reasonably rejected the suggestion that it institute a lottery. The rule providing for mandatory reassignment on the basis of seniority to fill any vacancy in an MMA for which there is no volunteer is clearly an inducement for inspectors to volunteer for such duty at their convenience when a position opens in an MMA that an inspector considers relatively desirable. As the court of appeals stated, a lottery would sharply reduce voluntary transfers to MMAs by "encouraging chancetakers to gamble on the possibility" that they would not be selected prior to retirement. Pet. App. 11a. That would lead to more

[5] Petitioners incorrectly claim (Pet. 22-23) that the court of appeals, rather than the Postal Service, articulated that justification of the CPP. However, the Postal Service explained in its brief in the court of appeals (at 47) that "the unrebutted evidence established that under the CPP *all* eligible Level 23 Inspectors were required to serve a tour of duty in an MMA."

involuntary transfers, which the Postal Service reasonably hoped to minimize.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] We note, finally, that to the extent that the Postal Service's policy is designed to take better advantage of the skills of its more experienced (and thus older) inspectors by assigning them to the areas with the most complex caseloads, it is entirely consistent with the aims of the ADEA – which was enacted to counteract "a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs." 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Javits).

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